Supreme Court, U.S.
FILED
MAR 16 1981
ALEXANDER L. STEVAS,

No. 80-1160

In the Supreme Court of the United States

OCTOBER TERM, 1980

HOLLYWOOD MARINE, INC., AND WATER QUALITY INSURANCE SYNDICATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the owner of a barge from which oil is spilled may avoid liability to the United States for clean-up costs by asserting that the tugboat operator that caused the spill is a "third party" under 33 U.S.C. 1321(f)(1).

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Statute:

Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* :

Section 311(f)(1), 33 U.S.C. 1321(f)(1) 2, 3, 4, 5, 6, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 625 F. 2d 524. The opinion of the district court (Pet. App. B1-B6) is reported at 487 F. Supp. 1211.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1980 (Pet. App. A1). A petition for rehearing was denied on October 15, 1980 (Pet. App. C4). The petition for a writ of certiorari was filed on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action was brought by the United States under the Federal Water Pollution Control Act for recovery of $61,816.85 in clean-up costs incurred by the United States

Coast Guard as a result of an oil spill from a barge owned by petitioner Hollywood Marine, Inc. (Pet. App. B2-B4). Hollywood Marine is engaged in the business of transporting petroleum cargo by barge in the coastal and inland waters of Texas (*id.* at B2). Its barges are towed by independent tugboat operators with whom Hollywood contracts for towage services (*id.* at B2-B3).

In this case, Hollywood contracted with Three Jack Towing, Inc., for the latter to provide the tugboat THREE JACK to tow Hollywood's barge T/B B-524 (Pet. App. B2). Under the contract, Hollywood apparently specified the points or route where the barge was to be loaded and discharged, and it delegated to Three Jack control over the method and manner of performing towing operations, including navigational matters (*id.* at B3).

On August 5, 1976, Hollywood's barge T/B B-524 discharged over 2,000 gallons of oil into the Intracoastal Waterway in Texas (Pet. App. B3). The spill occurred as a result of damage sustained by the barge while it was under Three Jack's control (*id.* at B4).

The Coast Guard took steps to have the spilled oil cleaned up, at a total cost to the United States of $61,816.85 (Pet. App. B4). Pursuant to Section 311(f)(1), (n) of the Federal Water Pollution Control Act, 33 U.S.C. 1321(f)(1), (n), the government subsequently filed suit in the United States District Court for the Southern District of Texas, seeking recovery of this sum from Hollywood as owner of the discharging vessel. Hollywood's defense was that the oil spill was caused by an act or omission of its independent contractor, Three Jack, and that Three Jack was a "third party" under Section 311 of the Federal Water Pollution Control Act, which excepts from liability for clean-up costs the owner of a discharging vessel where the discharge is caused solely by "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or

(D) an act or omission of a third party * * *." 33 U.S.C. 1321(f)(1).

The district court sustained this defense, finding that Hollywood was "protected by the third party defense to the Federal Water Pollution Control Act" (Pet. App. B6). The court considered the facts of the case to be "identical" (*ibid.*) to those found in *United States* v. *LeBeouf Brothers Towing Co.*, 1978 A.M.C. 2195 (E.D. La.) (not otherwise reported).

Shortly thereafter, the Fifth Circuit reversed the district court's decision in *LeBeouf* (Pet. App. B8-B13), holding that "the third-party defense in section 1321(f)(1) must be narrowly interpreted. The statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners * * * could escape strict liability merely by hiring out their operations to tugs and independent contractors" (*id.* at B12). See *United States* v. *LeBeouf Brothers Towing Co.*, 621 F. 2d 787, rehearing denied, 629 F. 2d 1350 (5th Cir. 1980).

On the basis of its decision narrowly construing the third-party defense in *LeBeouf*, the court of appeals summarily reversed the judgment of the district court in the present case (Pet. App. A1-A3). The court explained that, as in *LeBeouf*, "a tug will not be considered a 'third party' in order to allow the owner of a discharging vessel to avoid liability for an oil spill occurring while the vessel is in the tow of the tug" (*id.* at A2). Finding *LeBeouf* and the instant case to be "factually similar" (*ibid.*), the court of appeals accordingly reversed the district court's decision and remanded the case for further proceedings on the government's action for recovery of clean-up costs from Hollywood (*id.* at A3).

ARGUMENT

1. a. The court of appeals' construction of the third-party defense in the Federal Water Pollution Control Act is cor-

rect. Under the Act, the responsibility for clean-up of oil discharged from vessels into navigable waters is governed by a statutory scheme that imposes strict liability on the discharging vessel's "owner or operator" subject only to certain narrow defenses enumerated in the Act. Congress created no defense for the vessel owner based on the assertion that the discharge from its vessel was caused by an independent contractor, and the owner cannot avoid its statutory duties by asserting that the spill was caused by other persons to whom responsibility for the operation of the vessel had been delegated.[1] Thus, the court of appeals correctly concluded that the tug in this case is not a "third party" within the meaning of the defense provided by 33 U.S.C. 1321(f)(1)(D).

b. Notwithstanding petitioner's assertion, the Fifth Circuit's construction of the third-party defense in this case and in *LeBeouf* is fully consistent with the decision of the First Circuit in *Burgess* v. *M/V TAMANO*, 564 F. 2d 964 (1977), cert. denied, 435 U.S. 941 (1978).

In TAMANO, the First Circuit held that a pilot was not a "third party" so as to relieve the shipowner of responsibility for an oil spill resulting from a pilot-caused grounding. While the court observed that a pilot "is at all times subject to the ultimate control of the ship's master" (564 F. 2d at 982), that statement clearly was not the basis of the court's decision.[2] Rather, the court proceeded on the basis that a

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[1]We see no basis for distinguishing vessel contractors who are charged with navigation or towage of a vessel from other types of contractors (*e.g.*, repair yards, or oil loading and discharge operators), as urged in point II of the petition. All act for the vessel and therefore are not "third parties" under 33 U.S.C. 1321(f)(1). Moreover, contrary to petitioners' contention, both courts below correctly recognized (Pet. App. A2, B6) that this case and *LeBeouf* are substantially identical.

[2]The statement was directed to the shipowner's argument that the pilot was a "compulsory" pilot, and that taking a compulsory pilot should not be deemed to be an act within the responsibility of the shipowner (564 F. 2d at 982).

pilot *was* an "independent contractor." However, recognizing that unless the statutory defenses "are narrowly construed * * * the legislative purpose would be largely vitiated," the court reasoned that, because the first three of the defenses (act of God, act of war, and governmental negligence) "are manifestly addressed to actions entirely outside the ship, or in the case of actors, to strangers," the "third party" defense should be similarly construed to apply only to complete outsiders (564 F. 2d at 982). The First Circuit illustrated its holding by noting that "if [a ship's] valve failed because of an act of the installer, the owners should *not* be permitted to avoid liability by claiming that the installer was a third party because he was an independent contractor * * *. The installer acts for the ship" (*ibid.*; emphasis added). The court explained that while the vessel owner or operator "may have been forced by practical necessities to hire the particular shipyard that installed the defective valve * * * they must take the ports they select as they find them" (*ibid.*).

The analysis in *TAMANO* and its rejection of a "broad construction" of the third-party defense were expressly adopted and approved by the Fifth Circuit's holding in *LeBeouf* and in the present case that a tug operator under contract is not a "third party" with respect to the owner of the discharging barge. Both courts are in agreement that Congress did not intend to immunize a barge owner where the spill is caused by its contractor (the pilot in *TAMANO*, the tug operator here and in *LeBeouf*). Both courts agree that "third party," as used in 33 U.S.C. 1321(f)(1), means a complete outsider (*e.g.*, a colliding vessel or a vandal). See 564 F. 2d at 982; Pet. App. B11-B13. Accordingly, there is no merit to petitioners' contention that the construction of the third-party defense enunciated by the court of appeals here is in conflict with the decision of the First Circuit in *TAMANO*.

The other case cited by petitioners in support of their assertion of a conflict among the circuits is *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907 (S.D.N.Y. 1977), aff'd in part and rev'd in part, 584 F. 2d 1151 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979). In that case, oil was spilled from a barge as a result of a grounding caused by the negligence of the barge's tug. The government claimed clean-up costs from both the barge owner and the tug operator. The district court dismissed the government's claim against the owner on the ground that it was "not * * * responsible for the oil spill * * *" (436 F. Supp. at 926). The court provided no analysis of the third-party defense under 33 U.S.C. 1321(f)(1), although it did hold that the tug operator was subject to limited liability as a third party under 33 U.S.C. 1321(g) (436 F. Supp. at 926). The United States appealed only the limitation ruling and was successful in that appeal. See 584 F. 2d at 1161-1164. The Second Circuit had no occasion to address the question of the correctness of the district court's dismissal of the government's claim against the barge owner for clean-up costs, since that issue was not raised on appeal.

While there appears to be an inconsistency between the decision of the court of appeals here and the decision of the district court in *Ocean Prince* regarding the liability of a barge owner for clean-up costs, review by this Court is not required at present. To our knowledge, the district court's decision in *Ocean Prince* is the only judicial decision holding a barge owner immune from liability for clean-up of an oil spill caused by its tug operator. The district court's decision on the point in *Ocean Prince* is unexplained, and we believe that it is unlikely to be followed by other courts, especially in view of the recent decisions of the First Circuit in *TAMANO* and the Fifth Circuit in *LeBeouf* and here. If

it should be followed by a court of appeals in another case, there would be time enough at that point for the Court to resolve such a conflict.[3]

2. Petitioners also argue (Pet. 11; emphasis in original) that the Fifth Circuit's construction of the third-party defense in the Federal Water Pollution Control Act "overrule[s] long-standing admiralty precedent * * * holding that a dumb barge is *not* liable for the tug's fault merely because the two vessels are attached." Petitioners cite several cases involving collisions between a tug and tow and another vessel in which it was held that the towed vessel or barge is not responsible for the acts or omissions of the tug. See, *e.g.*, *Sturgis* v. *Boyer*, 65 U.S. (24 How.) 110, 122-125 (1860). Petitioners contend that the Fifth Circuit's decision in this case erodes or eliminates this doctrine, "thereby rendering every owner of a dumb barge, however innocent, vulnerable to third party liability *in all maritime litigation*" (Pet. 13; emphasis added).

This contention is an obvious overstatement and is legally unfounded. It is only in cases of discharges of oil from barges that the Federal Water Pollution Control Act imposes strict liability upon the barge owner. Nothing in the Fifth Circuit's construction of the Act has any effect on the

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[3]Petitioners' reliance (Pet. 9) on the statement of the district court in *Ocean Prince* that Congress "inject[ed] traditional admiralty concepts" into the limitation provision of 33 U.S.C. 1321(g) (see 436 F. Supp. at 923) does not support their position regarding the scope of the "third-party" defense in 33 U.S.C. 1321(f)(1). First, the district court's ruling on the limitation of liability in *Ocean Prince*, to which the statement was addressed, was reversed by the court of appeals. Second, while the concept of limitation does have historic antecedents in maritime jurisprudence, the concept of a "third party" in Section 311(f)(1) of the Federal Water Pollution Control Act is a statutory term of art concerned with present-day policies regarding responsibility for water pollution, and is not tied to traditional maritime jurisprudence regarding the law of collision. See pages 7-8, *infra*.

general maritime law that immunizes barge owners from liability for the maritime torts of their tug operators.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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[4]The general maritime law on this point is judge-made and does not turn on statutory terms such as "third party."